

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**August 18, 2015**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2015AP857**

**Cir. Ct. No. 2014TP16**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**IN RE THE TERMINATION OF PARENTAL RIGHTS TO W.G.,  
A PERSON UNDER THE AGE OF 18:**

**STATE OF WISCONSIN,**

**PETITIONER-RESPONDENT,**

**V.**

**T.P.,**

**RESPONDENT- APPELLANT.**

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**APPEAL** from an order of the circuit court for Milwaukee County:  
**MARK A. SANDERS, Judge. *Affirmed.***

¶1 KESSLER, J.<sup>1</sup> T.P. appeals an order terminating his parental rights to his son, W.G. T.P. argues that: (1) the circuit court erroneously discharged his

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2013-14).

counsel, pursuant to WIS. STAT. § 48.23(4m), after finding him in default for failing to attend several hearings; and (2) § 48.23 is unconstitutional as applied to him. We affirm.

## **BACKGROUND**

¶2 W.G. was born on April 11, 2013, with narcotics in his system. The State filed a CHIPS petition less than one month later, following an unsuccessful safety plan that would have allowed W.G. to stay with his mother. W.G. was taken into the custody of the Bureau of Milwaukee Child Welfare. T.P. had not yet been identified as the father.

¶3 T.P. was identified as W.G.'s father, following DNA testing, on September 18, 2013. Shortly thereafter, the circuit court found W.G. a child in need of continuing protection or services. The State petitioned to terminate the parental rights of both T.P. and W.G.'s mother. As to T.P., the petition alleged grounds of abandonment and failure to assume parental responsibility.

¶4 An initial hearing took place on February 25, 2014. T.P., who was in custody at the House of the Corrections at the time, was present. The circuit court explained the history of the case, the termination proceedings and T.P.'s rights during those proceedings. The court told T.P. that an attorney would be appointed to represent him and that his rights would be reserved until he returned to court with counsel. The court told T.P. that so long as he was in custody, the court would "make sure we get you here by virtue of an order to produce," but

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All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

warned T.P. that if he were released, he was responsible for attending all of his court appearances. The court warned:

Because if you don't get here, the D.A. will be within her rights to say, hey judge. You told [T.P.] how important this case is. And I have. You told [T.P.] to be here. He's not here. So judge, default him.

What a default means is take away your right to a jury trial, a court trial, a contest in the grounds phase. And if your misconduct is not being here, I have to go right into a disposition. You can't act in the absence of a defendant in a criminal case.... But in a civil case, you can. And that's why it's really important ... to make sure you make all of your court appearances.

.... Once you got your lawyer, stay in touch with and cooperate with your lawyer.... So once you're out of custody, you got to let your lawyer know your address.... [G]ive the lawyer your phone number. If that changes, give your lawyer the new phone number. If you should have an e-mail address and you've given it to your lawyer and it changes, you got to give your lawyer the new e-mail address.... [Lawyers] need to be able to communicate with their clients in order to provide effective representation.

T.P. told the court that he understood and that he planned to attend all of his court appearances.

¶5 T.P., still in custody, appeared at the next hearing on April 1, 2014, with counsel. W.G.'s mother was also to appear at the hearing, but failed to appear on time. Because the mother had failed to attend previous hearings as well, the court granted the State's petition to default the mother before she arrived. T.P. was present at this time. T.P. then denied the claims alleged in the termination petition. Counsel also told the court that T.P. would soon be released from custody. The court, having just granted the State's petition to default the mother, again warned T.P.:

If you don't show up and I find that your failure to be here is egregious or in bad faith and there's no clear and

justifiable excuse, or you're not staying in touch with and cooperating with your lawyer, or you're not cooperating in discovery, I can impose the severest of sanctions. I can take away your right to a jury trial, a court trial. I could default you in the grounds phase. And if you weren't here, I could go right into the dispositional phase.

¶6 T.P. was released from custody and appeared with counsel at the next court date, on May 13, 2014. At the end of the hearing, the court repeated its previous warnings about mandatory court attendance and keeping in touch with counsel, but also informed T.P. that pursuant to new state law, i.e. WIS. STAT. § 48.23(2)(b)3. and (4m),<sup>2</sup> a circuit court can dismiss counsel in termination proceedings if a parent fails to comply with court orders to appear:

[I]f your misconduct or your behavior is not being in court, missing court, [the court] can ... find[] it to be egregious, that is really bad, and if [the court] finds there's no clear

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<sup>2</sup> WIS. STAT. § 48.23 provides as relevant:

(2)(b)3. Notwithstanding subd. 1., a parent 18 years of age or over is presumed to have waived his or her right to counsel and to appear by counsel if the court has ordered the parent to appear in person at any or all subsequent hearings in the proceeding, the parent fails to appear in person as ordered, and the court finds that the parent's conduct in failing to appear in person was egregious and without clear and justifiable excuse. Failure by a parent 18 years of age or over to appear in person at consecutive hearings as ordered is presumed to be conduct that is egregious and without clear and justifiable excuse. If the court finds that a parent's conduct in failing to appear in person as ordered was egregious and without clear and justifiable excuse, the court may not hold a dispositional hearing on the contested adoption or involuntary termination of parental rights until at least 2 days have elapsed since the date of that finding.

....

(4m) Discharge of counsel. In any situation under this section in which counsel is knowingly and voluntarily waived or in which a parent is presumed to have waived his or her right to counsel, the court may discharge counsel.

(Some formatting altered.)

and justifiable excuse, [the court] can discharge your lawyers.

There's new law in Wisconsin now. The old law was once you asked for a lawyer and have a lawyer, you would have that lawyer during the entirety of the case. Even if you didn't show up, your lawyer had to represent you. But the legislature passed a law and [the Governor] signed the law saying that if you don't come to court and a judge finds that that is egregious, really bad and there's no clear and justifiable excuse, the judge can discharge your lawyer, which means you don't have a lawyer.... [A]nd of course [we] can put the case over two days and then do a dispositional hearing without you being there and can terminate your parental rights.

So it's really, really important you stay in touch with and cooperate with your lawyer, cooperate in discovery, follow all court orders, make all court appearances.

¶7 T.P. told the court that he understood the court's warning; however, eight days later, at the following hearing regarding visitation with W.G., T.P. did not appear. T.P.'s counsel told the court that she expected T.P. to come to court, but that he may have had a transportation problem. She had no other information about his whereabouts. The State told the court that T.P. was wanted on a probation warrant and would most likely not appear for fear of being taken into custody. The State told the court that T.P. was not in touch with his probation agent, and that according to the agent, T.P. was involved in further criminal activity. The State and the guardian ad litem (GAL) both moved the court to find T.P. in default. The guardian ad litem reminded the court that T.P. was present when the court found W.G.'s mother in default, and was therefore clearly aware of the consequences of his failure to appear. The court then attempted to call T.P. itself, but was unable to get through. The court left a voicemail for T.P., directing him to contact his attorney or case manager and gave the phone numbers for both. The court granted the State and GAL's motion to find T.P. in default:

I'm going to find him in default. I should note [T.P.'s counsel] gives very good examples of things that are egregious conduct. Certainly missing a trial date or final pretrial date is egregious conduct. But they aren't the only examples of egregious conduct. Egregious conduct in my view is doing something that unnecessarily burdens the case. And here what has happened is that we can't set a trial date because [T.P.] isn't here. That's an unnecessary burden for this case. It's an unnecessary burden for [W.G.] to have to carry for this case lingering on waiting for [T.P.] to voluntarily appear in court. The only way to relieve that burden is to find him in default.

If he comes here again I'll be happy to listen to why he wasn't in court today. If he's got a good reason for not being here then I'll certainly consider lifting that default finding.

¶8 T.P. did not appear in court again. Another hearing took place on July 7, 2014. T.P.'s counsel did not have an explanation for his absence and indicated that T.P. was not in touch with her. The court found that T.P.'s failure to appear for two consecutive hearings was egregious and without a clear and justifiable excuse. Pursuant to WIS. STAT. §§ 48.23 (2)(b)3. and (4m), the court found that T.P. waived his right to counsel and “relieve[d] [counsel] of her obligation to continue to represent [T.P.]” Counsel objected to the court's ruling, telling the court that T.P. may have been placed somewhere by his probation agent and unable to contact her. The court told counsel she was free “to investigate those things and appear on the next date.... Let me know what you discover from his probation agent, and let me know whether or not he's in custody, and appear in court on the next date.”

¶9 On the next court date, July 28, 2014, counsel told the court that T.P. had not been in touch with either her, or his probation agent, and that she was unaware of his whereabouts. The case was set for a final pretrial—another hearing

T.P. did not attend—and eventually proceeded to the grounds phase on October 27, 2014.

¶10 After hearing testimony from the family case manager, the court found that grounds existed to terminate T.P.’s parental rights to W.G. At the dispositional phase, the case manager testified as to each of the WIS. STAT. § 48.426 factors. The court also heard from W.G.’s foster mother. After considering the testimony and all of the statutory factors, the court found that it was in W.G.’s best interests to terminate T.P.’s parental rights. This appeal follows.

## DISCUSSION

¶11 On appeal, T.P. argues that the circuit court’s discharge of his counsel violated his constitutional right to due process. Specifically, he contends that WIS. STAT. § 48.23(4m) was unconstitutional as applied to his case. We disagree.

### **Standard of Review.**

¶12 Whether circumstances warrant termination of parental rights is within the circuit court’s discretion. *Brandon S.S. v. Laura S.*, 179 Wis. 2d 114, 150, 507 N.W.2d 94 (1993); *Gerald O. v. Cindy R.*, 203 Wis. 2d 148, 152, 551 N.W.2d 855 (Ct. App. 1996). In a termination of parental rights case, this court applies the deferential standard of review to determine whether the circuit court erroneously exercised its discretion. *See Rock County DSS v. K.K.*, 162 Wis. 2d 431, 441, 469 N.W.2d 881 (Ct. App. 1991).

¶13 This analysis requires a discussion of the circuit court’s application of WIS. STAT. § 48.23 (4m). “Statutes are presumed to be constitutional, and a

party challenging a statute's constitutionality must demonstrate that it is unconstitutional beyond a reasonable doubt. This presumption and burden apply to as-applied constitutional challenges to statutes as well as to facial challenges.” *State v. McGuire*, 2010 WI 91, ¶25, 328 Wis. 2d 289, 786 N.W.2d 227 (internal citation omitted). The party raising the constitutional challenge bears the burden, to prove beyond a reasonable doubt, that the statute at issue is unconstitutional as applied to him. *State v. Post*, 197 Wis. 2d 279, 301, 541 N.W.2d 115 (1995).

**The Circuit Court’s Application of WIS. STAT. § 48.23(4m) did not Violate T.P.’s Due Process Rights to a Fair Termination Proceeding.**

¶14 Effective April 25, 2014, the legislature enacted amendments to WIS. STAT. § 48.23 which permit a circuit court to discharge a parent’s counsel in a termination proceeding if the parent fails to appear at hearings. *See* 2013 Wis. Act 337. The statute now provides:

Notwithstanding subd. 1., a parent 18 years of age or over is presumed to have waived his or her right to counsel and to appear by counsel if the court has ordered the parent to appear in person at any or all subsequent hearings in the proceeding, the parent fails to appear in person as ordered, and the court finds that the parent’s conduct in failing to appear in person was egregious and without clear and justifiable excuse. Failure by a parent 18 years of age or over to appear in person at consecutive hearings as ordered is presumed to be conduct that is egregious and without clear and justifiable excuse. If the court finds that a parent’s conduct in failing to appear in person as ordered was egregious and without clear and justifiable excuse, the court may not hold a dispositional hearing on the contested adoption or involuntary termination of parental rights until at least 2 days have elapsed since the date of that finding.

....

Discharge of counsel. In any situation under this section in which counsel is knowingly and voluntarily waived or in which a parent is presumed to have waived his or her right to counsel, the court may discharge counsel.

WIS. STAT. §§ 48.23(2)(b)3., (4m).

¶15 T.P. acknowledges that there are multiple circumstances in which WIS. STAT. § 48.23 justifiably permits a circuit court to discharge counsel. However, he contends that the circuit court’s application of the statute to his case “failed to achieve the fundamental fair procedures needed to satisfy due [process] for proceedings terminating parental rights.” We disagree.

¶16 WISCONSIN STAT. § 48.23(2)(b)3. allows a circuit court to presume that a parent has waived his right to counsel if, after being ordered to appear in court, the parent fails to do so and the court finds that failure egregious and without a justifiable excuse. *See id.* A parent’s failure to appear for two or more consecutive hearings is presumed to be egregious. *Id.* If a court finds that a parent has waived his right to counsel, the court may discharge counsel pursuant to WIS. STAT. § 48.23(4m). *See id.*

¶17 T.P. fails to demonstrate how the circuit court’s application of WIS. STAT. § 48.23(4m) violated his due process rights. A review of the hearing transcript indicates that the circuit court carefully and thoroughly applied the language of WIS. STAT. § 48.23 to the facts of T.P.’s case. The court stated that the July 7, 2014 hearing was “the second court date ... for which [T.P.] has failed to appear.... Having by Statute 48.23(2)(b)(3), failure to appear at two consecutive court hearings after having been ordered to appear, could be determined to be a waiver of one’s right to counsel or appointed counsel.” In accordance with the plain language of the statute, the circuit court found T.P.’s conduct to be egregious and without a justifiable excuse. Nonetheless, the court stated that it would consider lifting its default finding if T.P. chose to reappear and explain his absences. Even after discharging counsel, the court permitted counsel

to investigate T.P.'s whereabouts and provide a possible explanation for his absences.

¶18 T.P.'s due process arguments ignore his own conduct, and ignore the fact that the circuit court provided numerous warnings about the consequences of failing to appear for hearings. The court specifically referenced WIS. STAT. § 48.23(4m) by telling T.P. that it had the discretion to remove his counsel if he failed to appear and failed to maintain contact with his counsel. T.P. was present when W.G.'s mother was found in default. He saw the consequences of failing to appear first-hand. T.P. was aware of the risks of violating the court's order. The circuit court appropriately applied the terms of the statute to the facts of T.P.'s case. T.P. has not met the burden of showing, beyond a reasonable doubt, that the circuit court's application of § 48.23(4m) was unconstitutional as applied to him based on his conduct in this case.

*By the Court.*—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

